

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MONTANA**

In re

**BRENDON KEITH RETZ,**

Debtor.

Case No. **04-60302-7**

**MEMORANDUM OF DECISION**

At Butte in said District this 14<sup>th</sup> day of June, 2005.

After expedited notice, hearing was held at Missoula on June 8, 2005, on the Trustee's Notice (Docket # 140) of Proposed Sale of 24,000 shares of Debtor's stock in Timberland Construction, Inc. ("TCI"), and objection<sup>1</sup> thereto filed by the Debtor on May 16, 2005 (Docket # 152). The Trustee Richard J. Samson ("Samson") appeared and testified in support of the proposed sale. The Debtor Brendon Keith Retz ("Retz") appeared and testified in opposition, represented by attorney Harold V. Dye ("Dye"). Proposed purchasers of the TCI stock Donald G. Abbey ("Abbey") and LDP Holdings, LLC ("LDP Holdings") were represented by attorney Edward A. Murphy ("Murphy"). Exhibit ("Ex.") 11, the proposed Agreement for sale of the TCI

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<sup>1</sup>An objection to the proposed sale was filed by former Custodian/Receiver, James H. Cossitt on May 17, 2005 (Docket # 156), but that objection was withdrawn on June 6, 2005 (Docket # 169).

stock, was admitted into evidence, as were Ex. 4, 5, and 6<sup>2</sup>. Also testifying were Abbey's attorney Michael G. Black ("Black"), who negotiated Ex. 11 with Samson's attorney, David Chisholm, certified public accountant ("CPA") William Matteson ("Matteson") who is employed as a consultant for Abbey, and Retz's attorney Thomas T. Tornow ("Tornow") . At counsel's request the Court took judicial notice of the complaint filed in Adversary Proceeding No. 04/00049, and also the final report filed in Adv. No. 04/49 by former Custodian/Receiver James H. Cossitt ("Cossitt") on October 1, 2004<sup>3</sup>. At the close of the testimony at hearing Dye requested the Court leave the record open and permit Retz to obtain deposition testimony of Glacier Bank executives, Dennis Beams and Nick Brodnick, neither of which were identified on Retz's witness list (Docket #167). Samson objected, and the Court denied Retz's request to leave the record open, but allowed Dye to make an offer of proof on the record<sup>4</sup>. Thereafter, the Court closed the record and Court took the Trustee's Notice of Proposed Sale of TCI stock, Docket #140, under advisement. After review of the record and applicable law, this matter is ready for decision. For the reasons set forth below, Retz's objection will be overruled and the

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<sup>2</sup>The latter 3 exhibits relate to Trustee's motion to approve compromise settlement, (Docket #136), and Retz's objection thereto (Docket # 150), which shall be the subject of a separate Memorandum.

<sup>3</sup>The First Amended & Substituted Final Report was filed with a motion for approval and discharge of Cossitt as receiver, Docket #84, with supporting exhibits, Docket #85, filed on October 8, 2004. The final report and discharge have not yet been finally decided and are the subject of a pending confidential settlement between the parties.

<sup>4</sup>Retz's offer of proof is that the bankers would testify that Retz told them at a meeting at which Abbey was present, that Retz said he had an agreement with Retz for land on Shelter Island rather than the customary 10% profit charged for construction, and that Retz thought Abbey would help him learn how to be successful in business, and that Abbey did not dispute Retz's statement.

Trustee will be authorized by separate Order to sell the TCI stock pursuant to Ex. 11.

This Court has jurisdiction of this Chapter 7 bankruptcy under 28 U.S.C. § 1334(a). The Trustee's proposed sale of 24,000 shares of Debtor's TCI stock is a core proceeding under 28 U.S.C. § 157(b)(2)(N). This Memorandum includes the Court's findings of fact and conclusions of law.

### **FACTS**

Brendon Keith Retz formed TCI in 1994 and owns 100% of the shares of stock in TCI, which was engaged in home and road construction. Abbey owns or controls Lakeshore Holdings, LLP ("Lakeshore") and LDP Holdings, which is a subsidiary of Lakeshore, and also owns an entity described in testimony as Abbey Holdings. Retz and Abbey met and decided to enter into a business relationship. Retz hoped and believed that Abbey would, in essence, take Retz under his wing and teach him how to become a successful businessman.

Abbey offered to hire TCI to construct a residence on his property on Shelter Island. Retz testified that TCI charged a customary rate for labor and equipment, and billed its subcontractor work at cost plus a 10% profit. He testified he and Retz reached a verbal contract for TCI to construct Abbey's residence on Shelter Island. Retz testified that he always believed that TCI's verbal contract was with Abbey personally, not Abbey Land or Abbey's other entities. Originally Abbey and Retz agreed that TCI would supply the labor and equipment billed at its normal rates and bill subcontractor work at cost plus 10%. As it happened, Abbey sent checks for payment to TCI drawn on Abbey Lands' account.

While the original agreement was between TCI and Abbey, Retz testified that Abbey offered Retz a parcel of land on Shelter Island in lieu of his normal 10% profit. While they never

defined the amount of land involved except that it would be equivalent to the value of the 10% profit TCI was foregoing, Retz accepted Abbey's offer personally, on his own behalf notwithstanding TCI's involvement, and would bill Abbey directly. Retz testified that he liked Abbey's offer of but did not know if he could afford it because of TCI's debt load, whereupon Abbey gave him the option of trying out the land option, and if it did not work out they could go back to the original arrangement of cost plus 10% profit. Retz admitted that this verbal agreement was never reduced to written contract form. He testified that he was reluctant to discuss his verbal arrangement because Abbey did not want the public to know of his plans for a subdivision on Shelter Island he planned to build along with his residence, but Retz disclosed it after hearing Abbey talk publicly about it.

Retz testified that when the Shelter Island project grew in scope he told Abbey that TCI was experiencing difficulty servicing its equipment debt without the usual 10% profit from the project. At that point, Retz testified, Abbey suggested they become partners so Abbey could supply capital, and they formed TCLLC to cover Retz's concern, with TCLLC taking over all of the assets and liabilities of TCI, including the verbal agreement between Retz personally and Abbey to construct Abbey's Shelter Island residence for land or for a 10% profit.

Retz testified he set up TCLLC originally in July 2001 as a single member LLC, with Retz contributing all assets, and that it took 8 or 9 months for them to negotiate and finalize an operating agreement which became effective in March of 2002<sup>5</sup>, with TCI owning a 50% interest and Abbey owning or controlling the other 50%. Retz testified that he was represented by counsel, Tornow, during the negotiations with whom he consulted about the TCLLC operating

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<sup>5</sup>Ex. 11 provides that the operating agreement became effective as of July 1, 2001.

agreement, and that he read it.

Retz testified that he and Abbey also formed Timberland Properties, LLC, (“Timberland Properties”) in which Retz and Abbey each owned or controlled a 50% share. Retz testified that Abbey wanted the ownership of the real property and related limited liability companies under Timberland Properties kept separate from the construction aspect on the properties performed by TCLLC.

Retz testified that after the operating agreement took effect, they continued to operate the Shelter Island project under the verbal agreement that Retz would get a piece of land. Under cross examination by Murphy, Retz read into the record the provision of the TCLLC operating agreement, paragraph 14.2 on page 45, which states the operating agreement is a complete agreement which replaces all prior written and oral agreements. Notwithstanding that provision, Retz argued on redirect examination that the TCLLC operating agreement did not address the construction of Abbey’s Shelter Island residence and their oral agreement for land in lieu of 10%.

Samson testified that TCLLC’s operating agreement required capital contributions from the members, and that Retz failed to make the required contribution<sup>6</sup> and so TCI is left with only an economic interest in TCLLC, not a voting interest. Retz, through his company TCI, had filed an action against Leesa Valentino (“Valentino”) for breach of contract and foreclosure of a construction lien on a residence which TCI constructed for Valentino, after she withheld payments from her construction loan. Valentino filed counterclaims against TCI based on structural deficiencies in construction, and Samson testified that Valentino’s counterclaims may

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<sup>6</sup>Samson testified that Retz contributed equipment and a construction lien claim against Leesa Valentino with an estimated value of \$200,000, while Abbey contributed \$300,000 cash to TCLLC.

exceed the amount of TCI's claim for payment against Valentino. Retz testified that, by this time, TCLLC had been formed and that Abbey told Retz to sue Valentino and Abbey still wanted to go forward with TCLLC. Tornow represented TCI in the Valentino suit, and he testified that the amount of the construction lien is \$209,000 plus interest and attorney fees.

The construction of Abbey's Shelter Island project begun under TCI proceeded under TCLLC after it was formed and later under the operating agreement, with TCLLC billing Abbey a total of just under \$10 million. Retz testified that TCLLC sent invoices to Abbey monthly, and that Abbey Land paid TCLLC's invoices monthly, until the last invoice in the amount of approximately \$400,000, including subcontractor work, which was not paid except that Abbey paid some of the subcontractors directly about half of their bill, so that \$200,000 remains on TCLLC's books as a receivable. Retz testified he told Samson and Cossitt about this unpaid \$200,000 account receivable from Abbey land and gave them records, but that they were more concerned with hard assets. Retz admitted that he told Samson he had nothing in writing with Abbey about the land or 10% profit owed, but that other people knew about it. Under cross examination Retz admitted that TCLLC's billing to Abbey on the Shelter Island project was just for time and materials, and he did not bill Abbey for cost plus the 10% profit Retz now claims is owed. Also, Retz testified that he now has a claim as an individual for an amount of land equivalent to the 10% profit foregone by TCI from the Shelter Island project. Retz never received Shelter Island land in lieu of the 10% profit.

Retz testified that TCLLC took out a line of credit, with Abbey as a co-maker on the note, which authorized TCLLC to draw advances of up to 65% of its accounts receivable, which Retz estimated at between \$750,000 to \$1 million per month, and that TCLLC always paid the interest

on the outstanding balance.

Retz's relationship with Abbey deteriorated. Retz and TCI filed a complaint against Abbey dated August 19, 2003, in Cause No. DV-03-440(B), Montana Eleventh Judicial District Court, averring various claims for relief including seeking a temporary restraining order to enjoin Abbey from interfering with Retz's financing obligations with Whitefish Credit Union and Glacier Bank of Whitefish or from destroying TCLLC, and in addition claims for breach of contract based on the Timberland Properties operating agreement (Count Two), breach of fiduciary duty, and tortious interference with Retz's business relations. Nothing in that complaint avers or seeks damages for Retz's verbal agreement with Abbey for land on Shelter Island in lieu of the 10% profit<sup>7</sup>. Under questioning by the Court on whether he ever reverted back from land to the 10% profit, Retz responded: "No", but immediately thereafter Retz stated that now he wants money paid rather than land. Cossitt was appointed Custodian/Receiver of TCLLC and other LLC entities in the state court action.

Retz filed his Chapter 7 petition on February 12, 2004, and filed his Schedules and Statements on March 1, 2004. Schedule B lists Retz's 100% interest in the stock of TCI, at an unknown<sup>8</sup> current market value, a 50% interest in Timberland Properties, LLC, at an unknown value, and 50% interest in the stock of TCLLC with an unknown value. Samson testified that

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<sup>7</sup>Retz's loan obligations for construction on Riverside Properties, LLC (paragraph 10); Edgewood Properties, LLC (paragraph 11); Copperwood Properties, LLC (paragraph 12); and Creekwood Lots, LLC, (paragraph 13), are discussed in the complaint, which highlights by contrast the omission from Retz's complaint of his claim asserted now based on the verbal agreement for the value of land foregone in the amount of \$200,000.

<sup>8</sup>Dye explained in response to the Court's question that the value of Retz's TCI stock is unknown because of the outstanding litigation with Valentino.

Retz does not directly own an interest in TCLLC, but owns an interest in TCLLC by means of his ownership of stock in TCI. Schedule B also lists at paragraph 17 a \$1,000,000 claim described as “Retz v. Abbey”, but lists “None” at paragraph 15: “Accounts receivable” despite Retz’s testimony that he has an individual claim for land equivalent to the foregone 10% profit from the Shelter Island project. Retz testified that his \$1 million claim against Abbey includes his claim for land/10% profit. Later under examination by the Court, Retz testified that his \$1 million claim against Abbey is based on 10% of the \$10 million total for Abbey’s home on Shelter Island, plus another \$200,000 for construction costs. Schedule F lists a \$3,500,000 contingent, unliquidated and disputed claim held by Donald G. Abbey.

Samson filed an asset notice and request for claims bar date on March 24, 2004. However, at the hearing Samson testified that, after many hours of extensive investigation of the Debtor’s records, and speaking with Abbey’s representatives, Samson has determined that this estate is administratively insolvent, and that TCI is not operating, is saddled with debt and has no assets other than an interest in TCLLC because of TCI’s default under the operating agreement, and that he seeks sale of the TCI stock and compromise of other litigation to escape the “quagmire” of litigation which is working a financial and personal hardship on the Trustee.

Samson admitted that his investigation included little discussion with Retz about TCLLC, but he had many discussions with Cossitt and Abbey’s representatives in addition to his own examination of Retz’s records. Samson testified that Retz was not forthcoming, and it took a long time for Retz to provide documents in response to Samson’s requests<sup>9</sup>. Samson testified

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<sup>9</sup>Samson explained that he is involved with litigation with Retz, and therefore he would not listen to Retz if he offered information, but Samson would listen to Retz’s attorney Dye.



that he conducted negotiations with Abbey over a period of many months after Retz's Chapter 7 petition was filed, with the aim to extricate the estate from the TCLLC "quagmire", and the pending notice of sale of TCI stock to Abbey and LDP Holdings is an effort to achieve that result.

Samson removed the state court lawsuit brought by Retz and TCI against Abbey to this Court by Notice of Removal filed with this Court on April 22, 2004, Adversary No. 04/49.

Matteson is a CPA licensed in California and Hawaii. Abbey hired him to assess the status of TCLLC's financial controls and verify TCI's compliance with TCLLC's operating agreement. Matteson testified that he was involved in Adv. No. 04/49, and that he worked with Cossitt for a period of time that he described as contentious. Matteson testified that TCLLC had very little financial controls, that deeds and transfers had not been completed and TCLLC was borrowing funds without Abbey's authorization as required under the operating agreement.

Cossitt filed his motion for approval of first amended final report and discharge of receiver on October 1, 2004 (Docket #84) in Adv. No. 04/49, and filed the exhibits to the final report on October 8, 2004 (Docket #85)<sup>10</sup>. In his final report and exhibits 6 and 23 thereto, Cossitt and the professional he engaged listed TCLLC's accounts receivable in the amount of \$1,106,741.00, but they doubted they have that much value. Ex. 6 and 23 to the final report state that Abbey's receivable is fraught with collection problems, is disputed by Abbey, and is of dubious collectibility. Samson and Abbey filed objections, and that matter was set for hearing on November 4, 2004, after which the Court entered an Order governing future proceedings

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<sup>10</sup>Ex. 1 to Cossitt's final report describes TCLLC's books as a "mess", and that its office was "unorganized chaos".

involving Cossitt's receivership.

Black testified that he was retained by Abbey in February 2004 to represent Abbey in Adversary No. 04/49, and that Black also negotiated with Samson's attorney David Chisolm for the sale by the estate of its TCI stock. Black testified that he had several discussions with Chisolm during 3 or 4 face-to-face meetings beginning in early 2005, and that the sale agreement went through 5 or 6 drafts with both sides contributing<sup>11</sup> before arriving at Ex. 11. Black testified that he was familiar with the TCLLC operating agreement and that it was part of his discussions with Chisolm.

Abbey's position with respect to TCI's status was and is that Retz's incapacity for failure to contribute to TCLLC was imputed to TCI. Under Montana law, Black testified, Retz/TCI retained only an economic, nonvoting interest as a member of TCLLC. Black and Samson discussed disassociation litigation, but tried over a period of 15 months to reach an agreement whereby the TCI stock would be sold to Abbey, without having to litigate the matter. Black characterized Ex. 11 as an arms-length agreement "no doubt", and "absolutely" negotiated in good faith. If the sale is not approved, Black testified, Abbey will proceed to litigate whether TCI is a nonvoting member of TCLLC only. Black testified that TCLLC is insolvent because it cannot pay its creditors and its liabilities exceed its assets, and that Abbey's position is that TCLLC will never be able to make a distribution to its members.

Samson gave an opinion based on his investigation of the Debtor's records that TCLLC has no tangible assets remaining, that all its real estate has been sold and secured debt retired, and that TCLLC is a nonoperating LLC with no value left for the estate and no assets to retire

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<sup>11</sup>Chisolm discarded Black's first draft and drafted a new agreement.

TCLLC's unsecured debt and distribute anything to its members. He further testified that because TCI failed to make its required capital contribution under the TCLLC operating agreement, he agrees that TCI is disassociated and has no voting rights in TCLLC.

Matteson examined TCLLC's records. He testified that TCLLC's assets were less than \$2.6 million, not including accounts receivable he deemed uncollectible, while its liabilities exceeded \$2.7 million. Matteson testified that Cossitt concentrated on trying to unwind TCLLC and other entities for which he was Custodian/Receiver, and did not expend effort to collect accounts receivables of dubious collectibility. Matteson testified that Cossitt requested the state court allow TCLLC to go into Chapter 7 liquidation, but Abbey would not agree because of the state of the records and unwillingness to give Cossitt a blank check.

Among TCLLC's liabilities were a \$500,000 loan from American Bank for working capital to build on Shelter Island. That line of credit was secured by accounts receivable, some of which were collected, but the line of credit was depleted by Retz, according to Matteson's testimony, without Abbey's authorization. Abbey, through an entity he owns which Matteson described as Lakeshore Drive Properties, LLC, acquired the \$500,000 note. Under questioning by the Court Matteson testified he was involved in the negotiations with Samson for the purchase of the TCI stock. Matteson testified that he thought the TCI stock had a nuisance value of \$5,000, and that he discovered a negative interest of about \$200,000 per member of TCLLC.

The proposed sale agreement, Ex. 11, provides at page 5, paragraph 10 for a release of the Trustee, TCI and Retz for failure to contribute the value of Valentino receivable and brokerage account, and in addition provides for payment by LDP Holdings to the Trustee of the sum of \$40,000.00 at closing in return for 24,000 shares of TCI stock, and an additional 20% of net

proceeds from the disposition of other tangible assets. A remaining 1,000 shares of outstanding TCI stock in Retz's name remains estate property subject to a further option. Ex. 11, p. 5, paragraph 9 (\$10 for 1,000 remaining shares upon written demand by either party).

Samson stated that there is value to the estate for Ex. 11's release from liability for TCI's failure to contribute the value of the Valentino litigation and brokerage stock account. Samson stated it was in the estate's best interest to extricate it from the Valentino counterclaim against TCLLC based on his discussion with various attorneys and his investigation, and the hardship on the Trustee of continued involvement in this "quagmire".

Samson testified that he has confirmed that LDP Holdings has placed \$40,000 in an escrow account which will be available to the estate if the proposed sale of TCI stock is approved. The \$40,000 payment Samson negotiated with LDP Holdings represents approximately 20% of the value of the net proceeds from the sale of TCLLC properties by the Trustee to date<sup>12</sup>. Additional funds may be payable under Ex. 11, paragraph 2(b), in the amount of 20% of the net proceeds from the sale of other tangible assets. Black testified that the 20% estate share may apply to net proceeds of \$50,000 which is presently property of TCLLC, and Black agreed that, if the \$50,000 is released to TCLLC by the Court, LDP Holdings will have to pay the estate \$10,000 as its 20% under paragraph 2(b) of Ex. 11. Samson testified that such other funds may be paid to the Trustee from closing of the Copperwood property sale, a property

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<sup>12</sup>Samson testified that approximately \$78,000 in net proceeds resulted from the sale of TCLLC properties by Stipulation in January 2005, including the 210 Parkhill condo property, 247 Wisconsin and the Creekwood property (Edgwood), after paying closing costs and of which \$28,000 is treated as an interim payment of Cossitt's fees. Although Samson retains \$50,000 in his trust account, he negotiated the \$40,000 initial purchase price with LDP Holdings based on the entire \$78,000.

which Samson testified he believes<sup>13</sup> is owned by Timberland Property LLC, which Samson testified will result in the estate having funds for the first time.

Samson testified that based on his investigation the estate has no claims against Cossitt, and that Abbey's alleged malpractice claims against Cossitt are not tangible assets of TCLLC. Black testified that the alleged claims brought by Abbey against Cossitt are not considered tangible assets of TCLLC, and so are not subject to the 20% share under paragraph 2(b) of Ex. 11.

Samson testified that, if his proposed sale of TCI stock to LDP Holdings is approved, Abbey will be in effective control of TCLLC. However, Samson and Black both testified that Abbey already is in effective control of TCLLC through entities Abbey controls because Retz/TCI was disassociated as a member of TCLLC based on TCI's failure to make the required capital contributions of the value of the Valentino claim and the brokerage stock account. If the sale is approved the Trustee and estate will be extricated from TCLLC, and Abbey through his entities will be free to pursue or settle the Valentino claims and other TCLLC affairs.

Retz objects to the sale of TCI stock to Abbey and asserts that Abbey owes him up to \$200,000 for construction of Abbey's house on Shelter Island, which Retz claims is owed under the oral agreement whereby Retz agreed to accept a parcel of real property on Shelter Island in lieu of the 10% customary profit Retz charged for construction by TCI, and later TCLLC.

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<sup>13</sup>Samson testified that the legal work setting up Retz's businesses was of questionable quality, but that notwithstanding LDP Holdings agrees to pay the estate 20% of Copperwood as though it is TCLLC property. Black testified that Copperwood was purchased from TCLLC, but TCLLC was not paid for it and Abbey did not authorize the sale. Black became agent for TCLLC as part of Abbey's agreement with Cossitt, but only after he obtained written waiver of conflicts from Abbey and Samson, after which Black negotiated a sale, conveyance and release of TCLLC's interest in Copperwood.

Samson, however, testified that his investigation did not reveal that Abbey owed TCLLC anything for construction of Abbey's Shelter Island house. Samson testified that he never viewed Abbey as personally liable to Retz or the estate for the construction because Abbey Land and TCLLC had a written operating agreement.

On rebuttal Samson argued that Retz failed to disclose his oral agreement with Abbey for land in lieu of 10% until the hearing, and that Samson has never come across anything in his investigation showing such a side agreement until Retz's testimony. Samson repeated that this case is taking a heavy toll on the Trustee personally and financially. In addition to Retz's failure to disclose this alleged \$200,000 account receivable based on a verbal agreement until trial, Samson asked for judicial notice of Cossitt's final report filed in Adversary No. 04/49 (Docket #85), based on which Samson concluded that Abbey's receivable was reduced by payments to about \$67,000, which is still not enough for the members of TCLLC to take a draw or distribution.

Samson asked Retz on cross examination if Retz has ever offered to purchase from the estate his TCI stock which is now subject to purchase by LDP Holdings, and Retz responded: "No". Samson advised the Court that he would entertain a cash offer from Retz, but that other than Retz and Abbey no interested buyer exists or has not come forward for TCI, which is an insolvent Subchapter S corporation, and which is not operating, is saddled with debt and has no assets.

The Court questioned Samson, Retz, Black, Matteson and Dye on whether they knew of any facts showing fraud, collusion between the purchaser and other bidders or the Trustee, or an attempt to take grossly unfair disadvantage of other bidders. None of the witnesses testified of

the existence of any facts showing fraud, collusion or attempt to take grossly unfair disadvantage by the Trustee, but Dye, on behalf of Retz, commented that Abbey was on all sides of the proposed sale, which may suggest an unfair disadvantage. Black testified that, as an officer of the court, he would have to disclose of any indicia of fraud and that he is aware of none. Retz testified he is not suggesting wrongdoing by Samson, but that Samson should have been aware of the outstanding \$200,000 account receivable owed by Abbey for the land/10% profit, and that Samson's lack of awareness of that asset gave Abbey an unfair advantage. Retz had no evidence of collusion between Samson and Abbey. Dye responded that he knows of no indicia fraud or collusion by Samson, but that there are indicia of self-dealing by Abbey since he is on all sides of the proposed sale by virtue of his status as a major creditor and debtor of TCLLC.

## **DISCUSSION**

### **I. Contentions of the parties.**

Samson seeks to sell the estate's interest in 24,000 shares of TCI stock in order to extricate the estate from the TCI/TCLLC "quagmire", a term Samson repeated based on the volume of litigation this case presently entails at a time when it is administratively insolvent and a financial and personal hardship on the Trustee. Samson argued at the hearing that the offer by Abbey of \$40,000, plus a possible additional payment, for the TCI stock is fair and equitable and more than he could reasonably expect to obtain from sale of the TCI stock, a nonpublicly traded, nonoperating subchapter S corporation which is saddled with debt and has no assets. Samson argued that only Abbey or Retz would be interested in purchasing the TCI stock, and Samson stated that if Retz wished to make a cash offer to compete with Abbey's and LDP Holding's offer he would entertain Retz's offer. Samson advised the Court that he found no record in his

investigation of the verbal side agreement between Retz and Abbey for land on Shelter Island in lieu of the customary 10% profit for building Abbey's home, but that he would look into it.

Retz objects to the sale of TCI stock to Abbey because he argues Samson obtained information on the value of TCLLC only from Abbey and his agents and attorneys, and did not obtain information from Retz or his state court attorney or family. As a result, Retz contends, Abbey is on all sides of the proposed sale as TCLLC's creditor, debtor and purchaser and will have an unfair advantage if he is allowed to purchase the estate's TCI stock because Abbey will control TCLLC without giving any value for the \$200,000 worth of home construction he received from TCLLC and Retz. Retz argues that approval of the sale should be denied and Samson directed to obtain the opinion of an independent counsel or accountant as to the true value of TCI and TCLLC. At hearing Dye argued that he understands the Trustee's financial exigencies, but that Samson listened only to Abbey and should have inquired of Retz about the account receivable Retz claims Abbey owes TCLLC for the Shelter Island land or 10% profit.

## **II. 11 U.S.C. § 363(b) – Sale of Property of the Estate.**

The trustee, after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate. 11 U.S.C. § 363(b)(1). Indeed, Samson as Trustee not only has the authority under § 363(b)(1) to sell property of the estate but also has the statutory obligation to investigate the financial affairs of the debtor, collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest. *In re United Ins. Management, Inc.*, 14 F.3d 1380, 1386 (9<sup>th</sup> Cir. 1994); 11 U.S.C. § 704(1), (4).

Retz argues that the Trustee failed to consult with him about the value of the TCI stock or



Abbey's receivable, and that sale of the TCI stock will leave Abbey in control of TCLLC and give him the benefit of \$200,000 in free construction for his Shelter Island residence to the detriment of the estate. The Court had the opportunity to observe the demeanor of the witnesses during trial and under cross examination, and based upon the Court's observations the Court finds that Samson is a credible witness. *In re Taylor*, 514 F.2d 1370, 1373-74 (9<sup>th</sup> Cir. 1975); *See also Casey v. Kasal*, 223 B.R. 879, 886 (E.D. Pa. 1998). Samson stated that Retz was not forthcoming in response to the Trustee's request for information, and the Court agrees.

Cossitt's final report in Adversary No. 04/49 corroborates Samson's testimony of the difficulty entailed in locating and investigating Retz's records. Cossitt's accountant described TCLLC's books obtained from Retz as a "mess" and that its office was "unorganized chaos". Cossitt's conclusion that Abbey's receivable owed to TCLLC is of dubious collectibility corroborates Samson's conclusion, which is further buttressed by the consistent although admittedly biased testimony of Abbey's representatives Black and Matteson. Retz complains of the Trustee's ignorance about the \$200,000 receivable from Abbey, but Retz responded to the Court's inquiry that he never exercised his option to revert back from the right to Shelter Island land to TCI's usual 10% profit, and only then for the first time at the hearing did Retz announce that he wanted the 10% profit in the remaining amount of \$200,000. Samson can be excused for not learning about the \$200,000 receivable when Retz listed "None" under accounts receivables on Schedule B, when nothing exists in writing evidencing the verbal agreement between Retz and Abbey which in effect skimmed TCI's 10% profit for Retz's personal benefit without anyone else's knowledge, and Retz did not assert his right to the 10% profit until near the end of his testimony at trial.

Dye admitted the legal problems entailed in attempting to enforce the alleged verbal side agreement between Retz and Abbey based upon which Retz claims a \$200,000 receivable owed by Abbey. In addition to the obvious problems of proving the existence of a disputed verbal agreement in litigation with its inherent risk of failure, Montana law provides that when a contract is reduced to writing the intention of the parties is to be ascertained from the writing alone if possible. Mont. Code Ann. § 28-3-302. Retz was compelled under cross examination to read from TCLLC's written operating agreement the provision at paragraph 14.2, page 45, which states the operating agreement is a complete agreement which replaces all prior written and oral agreements.

The Trustee's notice of proposed sale seeks to extricate the estate from such a quagmire of legal impediments to success, which in all likelihood would incur substantial amount of legal fees and expenses for an estate which is administratively insolvent. Neither the estate nor TCLLC has assets or income to finance such an uphill fight with dubious prospects. The Court agrees that the Trustee's goal to extricate the estate from this quagmire in return for payment of \$40,000, a release from the Valentino counterclaim and other consideration is in the best interests of the estate.

Retz argues that Abbey is self-dealing, and is on both sides of the transaction as debtor and creditor to TCLLC and would gain complete control of TCLLC if the sale is approved. The evidence in the record suggests, however, that Abbey is already in control of TCLLC because of Retz/TCI's failure to make required capital contributions, and TCI's loss of voting rights. This dispute also would be the subject of litigation and resulting expense, in which TCI and Retz would face the uphill battle of showing they made the required capital contribution, at a time

when the Valentino litigation is nowhere near decided.

After considering the evidence set forth in detail above, the Court finds that the Trustee has satisfied his duty under § 704(4) of investigating the financial affairs of the Debtor. The Court finds and concludes that the Trustee's proposed sale of TCI stock to LDP Holdings in return for the release from further liability under the operating agreement, \$40,000.00, and possible further distribution as provided in Ex. 11 is in the best interests of the estate and parties in interest, and satisfies the requirements of § 363(b)(1).

### **III. 11 U.S.C. § 363(m) – Save Harbor.**

If a sale is authorized under § 363(b), the reversal or modification of such authorization does not affect the validity of a sale under such authorization to an entity that purchases or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization were stayed pending appeal. 11 U.S.C. § 363(m). This “safe harbor” provision places the burden of proof on parties who desire its protection to establish an evidentiary record for the bankruptcy court to make findings of fact and conclusions of law that the sale was in good faith. *In re M Capital Corp.*, 290 B.R. 743, 745, 747, 752 (9<sup>th</sup> Cir. BAP 2003). *M Capital* notes that lack of good faith is shown by fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders. *M Capital*, 290 B.R. 746-48; *Community Thrift & Loan v. Suchy (In re Suchy)*, 786 F.2d 900, 902 (9<sup>th</sup> Cir. 1985); *Ewell v. Diebert (In re Ewell)*, 958 F.2d 276, 281 (9<sup>th</sup> Cir. 1992); *In re Thomas*, 287 B.R. 782, 785 (9<sup>th</sup> Cir. BAP 2002).

The good faith determination is fact-intensive, and is complicated by the fact that evidence probative of good faith is not commonly introduced, or even reasonably available, at the

time a bankruptcy court approves a sale. *M Capital*, 290 B.R. at 747-48; *In re Thomas*, 287 B.R. at 785-86. Because findings of good faith at the time of a sale may be premature, the Ninth Circuit does not require that a finding of good faith be made at the time of sale. *M Capital*, 290 B.R. at 748-49; *In re Thomas*, 287 B.R. at 785.

In the instant case the Court conducted an extensive evidentiary hearing at which witnesses appeared and testified. The Court questioned Samson, Black, Matteson, Retz and Retz's attorney Dye about whether they knew of any facts showing fraud, collusion between the purchaser and other bidders or the Trustee, or an attempt to take grossly unfair advantage of other bidders. None of those witnesses or Dye offered any evidence of fraud or collusion between Abbey and the Trustee. Dye argued that there was indicia of self-dealing by Abbey, who Dye contended is on all sides of this transaction. *M Capital*, however, does not prohibit self-dealing by a bidder. No bidders for the estate's TCI stock appear to exist other than Abbey and LDP Holdings. Retz was asked and given the opportunity by the Trustee, but has not submitted a bid. With no other bidders, no collusion exists between Abbey and other bidders. No evidence or any allegations of fraud exist involving the Trustee, and no evidence exists in the record of fraud by Abbey or of collusion between the Trustee and Abbey/LDP Holdings.

Ex. 11 reflects a recovery by the Trustee of more than \$40,000 and a release from liability of the Valentino counterclaim and the operating agreement in exchange for the sale of stock by an estate which is administratively insolvent. The expected sale proceeds significantly exceed Matteson's estimate of nuisance value for the stock, and rather than collusion, the \$40,000 sale price and other consideration in Ex. 11 reflect Abbey's calculation, after protracted negotiations between counsel, that a bid in excess of the apparent value for the TCI stock is worth a resolution

of protracted litigation from his perspective. The Court finds and concludes such a result in the best interest of the estate and parties in interest, including for the Trustee who will be relieved from a substantial hardship in this protracted litigation. The Court concludes, at this time and based upon the credible evidence on the record, that Abbey/LDP Holdings' proposed purchase of the TCI stock is in good faith.

### **CONCLUSIONS OF LAW**

1. This Court has jurisdiction of this Chapter 7 bankruptcy under 28 U.S.C. § 1334(a).
2. The Trustee's proposed sale of 24,000 shares of Debtor's stock in TCI is a core proceeding under 28 U.S.C. § 157(b)(2)(N).
3. The Trustee satisfied his burden of proof, by a preponderance of the evidence after notice and a hearing, that the proposed sale of 24,000 shares of TCI stock in return for the release from further liability under the TCLLC's operating agreement, payment by LDP Holdings of \$40,000.00 plus possible additional consideration, is in the best interests of the estate and parties in interest and satisfies the requirements of 11 U.S.C. § 363(b)(1), and that the sale is in good faith and does not involve fraud, collusion between the purchaser and other bidders or the Trustee, or an attempt to take grossly unfair advantage of other bidders as required under 11 U.S.C. § 363(m).

**IT IS ORDERED** a separate Order shall be entered in conformity with the above, overruling the Debtor's objection (Docket # 152), granting the Trustee's request and authorizing the Trustee to sell 24,000 shares of stock to LDP Holdings in accordance with the terms and conditions set forth in the Trustee's Notice of Proposed Sale of Property (Docket # 140) and Ex. 11 attached thereto.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER

U.S. Bankruptcy Judge

United States Bankruptcy Court

District of Montana